No. 17-1104

IN THE

Supreme Court of the United States

AIR AND LIQUID SYSTEMS CORP., CBS CORPORATION, AND FOSTER WHEELER LLC,
Petitioners,

v.

ROBERTA G. DEVRIES, Administratrix of the Estate of John B. DeVries, Deceased, and Widow in her own right,
Respondent.

INGERSOLL RAND COMPANY,
Petitioner,

v.

SHIRLEY MCAFEE, Executrix of the Estate of Kenneth McAfee, and Widow in her own right,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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(continued from front cover)

QUESTION PRESENTED

Can products-liability defendants be held liable under maritime law for injuries caused by products that they did not make, sell, or distribute?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The petitioners, all of whom were defendants-appellees below, are:

1. Air & Liquid Systems Corp. is a wholly owned subsidiary of Ampco-Pittsburgh Corporation, a publicly traded corporation. It is the successor-by-merger to Buffalo Pumps, Inc.

2. CBS Corporation is a publicly traded company. National Amusements, Inc. is a privately held company, which beneficially owns directly and indirectly the majority of the voting stock of CBS Corporation. To CBS Corporation's knowledge, no publicly held corporation owns 10% or more of the voting stock of CBS Corporation.

3. Foster Wheeler LLC is a wholly-owned indirect subsidiary of John Wood Group plc (Scotland), a publicly traded company. No known person or entity currently owns 10 percent or more of John Wood Group plc's (Scotland) publicly traded common stock.

4. The parent company for Ingersoll-Rand Company is Ingersoll Rand PLC, a publicly traded corporation. No other publicly traded corporation owns more than 10 percent of Ingersoll Rand Company stock.

General Electric Company is also a respondent supporting the petitioners under Rule 12.6. It was a defendant-appellee below. It will be filing its own brief.

The plaintiffs-appellants below, who are respondents in this Court, are:

1. Roberta DeVries, in her individual capacity and in her capacity as administratrix of the estate of John B. DeVries, and

2. Shirley McAfee, Executrix of the Estate of Kenneth McAfee, Deceased, and Widow in her own right.

In addition to the petitioners and the General Electric Company, the following parties were listed as either defendants or defendants-appellees on the Third Circuit's docket below:

1. 20th Century Gove Corp. of Texas
2. Allen Bradley Co.
3. Allen Sherman Hoff
4. American Optical
5. American Optical Corp.
6. AMTICO Division of American Biltrite
7. Aurora Pumps
8. AZRock Industries, Inc.
9. AO Smith Corp.
10. BF Goodrich Co.
11. Baltimore Ennis Land Co. Inc.
12. Bayer Cropscience Inc.
13. Borg Warner Corp.
14. Burnham LLC
15. BW/IP Inc.
16. Carrier Corp.
17. Certain Teed Corp.

18. Cleaver Brooks Inc.
19. Crane Co.
20. Crown Cork & Seal Co., Inc.
21. Federal Mogul Asbestos Personal Injury Trust
22. Gallagher Fluid Seals, Inc.
23. Goodyear Tire & Rubber Co.
24. Goulds Pumps, Inc.
25. Hajoca Corp.
26. Hampshire Industries, Inc.
27. IMO Industries, Inc.
28. J.A. Sexauer
29. J.H. France Refractories Co.
30. John Crane, Inc.
31. Metropolitan Life Insurance Co.
32. Minnesota Mining & Manufacturing Co.
33. McCord Gasket Co.
34. NOSROC Corporation
35. Oakfabco, Inc.
36. Owens-Illinois, Inc.
37. Parker Hannifin Corp.
38. Pecora Corp.
39. Peerless Industries, Inc.
40. Riley Stoker Corp.
41. Selby Battersby & Co.
42. Sid Harvey Mid Atlantic, Inc.
43. Thermal Engineering, Inc.

44. Trane U.S. Inc.

45. Warren Pumps, LLC

46. Weil McClain Division of the Marley Co.

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OPINIONS BELOW

1. ***Air & Liquid Systems Corp., et al., v. DeVries.*** The United States District Court for the Eastern District of Pennsylvania awarded summary judgment to the defendants in a series of unpublished orders. *See* 2014 WL 6746811 (Foster Wheeler LLC), Pet. App. 71a; 2014 WL 6746795 (CBS Corporation), Pet. App. 63a; 2014 WL 6746960 (Buffalo Pumps, Inc.).

The United States Court of Appeals for the Third Circuit remanded in an unpublished order. Pet. App. 48a–51a. The District Court again awarded summary judgment, in an opinion published at 188 F. Supp. 3d 454. Pet. App. 20a–42a. The Third Circuit reversed in an opinion published at 873 F.3d 232. Pet. App. 1a–17a.

2. ***Ingersoll Rand Co. v. McAfee.*** The Eastern District of Pennsylvania awarded summary judgment to Ingersoll-Rand Company in an unpublished order available at 2014 WL 12601085. Pet. App. 55a.

The Third Circuit remanded in an unpublished order. Pet. App. 43a–47a. The District Court again awarded summary judgment in an unpublished order. Pet. App. 18a–19a. On appeal, the Third Circuit consolidated the case with *DeVries* and reversed in an opinion published at 873 F.3d 232. Pet. App. 1a–17a.

JURISDICTION

John and Roberta DeVries sued nearly 50 entities in Pennsylvania state court. So did Kenneth and Shirley McAfee, in a separate action. Both cases were removed to the Eastern District of Pennsylvania. That court had jurisdiction under 28 U.S.C.

§ 1333(1), because both cases arose from injuries that allegedly occurred aboard vessels on navigable waters, and under § 1442(a)(1), because several defendants stated a colorable federal common-law defense to claims arising from their conduct as contractors for the United States Navy.

After the District Court awarded summary judgment to the petitioners in both cases, Roberta DeVries and Shirley McAfee (in their individual capacities and on behalf of their husbands' estates) separately appealed to the Third Circuit. That court had jurisdiction under 28 U.S.C. § 1291. It consolidated the cases and decided them on October 3, 2017. Justice Alito extended the petitioners' time to petition for certiorari until January 31, 2018, and they filed on that date. *See Air & Liquid Sys. Corp., et al. v. DeVries, et al.*, No. 17A625. This Court granted certiorari on May 14, 2018, and has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

> The judicial Power shall extend ... to all Cases of admiralty and maritime Jurisdiction ...
>
> U.S. Const. art. III, § 2, cl. 1.

INTRODUCTION

The defendants are military contractors. Each contracted with the Navy to manufacture and supply shipboard equipment, which each agreed to make and supply in the manner and form dictated by the Navy's precise specifications. The plaintiffs are the estates and wives of former sailors. They allege that the sailors were injured by asbestos-containing materials that the Navy (or a third-party shipbuilder) added to the defendants' equipment after the defendants delivered it to the Navy. They concede that the defendants did not make, sell, or distribute these later-added materials. They nonetheless say that the defendants should have warned about the risks associated with this third-party asbestos. The Third Circuit agreed with this position, and held as a matter of general maritime law that equipment manufacturers may be liable for failing to warn about the risks of third-party asbestos.

The Third Circuit erred. Product manufacturers are not liable under general maritime law for injuries caused by products that they did not make, sell, or distribute. Because it is undisputed that the petitioners did not make, sell, or distribute the asbestos alleged to have caused the sailors' injuries, each is entitled to judgment as a matter of law. This Court should reverse the Third Circuit's judgment.

STATEMENT OF THE CASE

1. The Navy controls what goes on its ships. For much of the twentieth century, the Navy exercised that control to require the use of asbestos. *See* JA 35–56. For example, it used asbestos-containing materials with its steam-driven propulsion systems.

These systems integrated many pieces of equipment and thousands of feet of piping. Combined, they generated heat that produced steam that powered turbines that propelled Navy ships. The Navy used asbestos as insulation on the exterior of the systems' equipment and piping. It also used asbestos-containing parts inside these systems. JA 40. For instance, many gaskets used to form seals between metal components contained asbestos. JA 378–80; *see also* JA 318–19, 395.

The Navy required and used asbestos in many other ways too, including in gaskets for equipment (like air compressors) that played no role in the steam-propulsion systems. Pet. App. 61a; JA 518–19. Indeed, asbestos was so prevalent on ships that, despite being prized for its light weight, it added as much as 300 tons to aircraft carriers and 22 tons to destroyers. JA 36.

The asbestos used aboard ships sometimes had to be replaced. *See* JA 280–81. For example, insulation, gaskets, and other asbestos-containing materials used with the steam-propulsion systems had to be replaced because they wore out. And if sailors had to break a seal formed by an asbestos gasket to fix equipment to which the seal was connected, they would replace the asbestos-containing gasket with a new one. *See* JA 318–20.

The Navy knew that asbestos could be dangerous. *Housepian v. Crane Co.*, 2016 WL 4158891, at *3 (E.D. Mo. Aug. 5, 2016); *see* JA 56–66. As early as 1922, the *Navy Health Bulletin* recommended precautions for those working with asbestos. JA 57. In 1939, the Navy Surgeon General reported that asbestos causes lung disease and prescribed methods to

prevent inhalation. JA 59. That same year, the *Handbook of the Navy Hospital Corps* recommended that those working with asbestos use masks. JA 58–59. And in 1943, the Navy co-authored (with the U.S. Maritime Commission) safety standards that recommended the use of "respiratory protective equipment" in general, and "dust respirator[s]" in particular, when handling asbestos. JA 63; *see generally* JA 110–94. These examples, and many like them, show that "by 1940" the Navy "was a leader in the field of occupational medicine relating to ... asbestos exposure." *Harris v. Rapid Am. Corp.*, 532 F. Supp. 2d 1001, 1006 (N.D. Ill. 2007).

The Navy used asbestos-containing materials because its engineers concluded that asbestos "best met the Navy's military requirements" despite its risks. JA 35–36. It was well-suited for use aboard Navy ships because of its "optimum heat retention, low weight, fire resistance, resistance to water damage and insect infestation, and cost-efficiency." JA 36; *see* JA 194–205. Its light weight was particularly important: Without insulation, the ship's systems "would be inefficient due to loss of heat[,] and sailors would be burned or unable to operate in engineering spaces due to heat levels." JA 36. But every pound of insulation was one less pound of "weapons or fuel" that the ship could carry. JA 36. As a result, the Navy needed its insulation to be as light as possible. Asbestos achieved this, while protecting sailors from dangerously hot equipment.

The Navy continued requiring asbestos parts and insulation until it found acceptable substitutes in the late 1970s. JA 36. Only then did it begin to remove and replace the asbestos-containing materials with

the safer substitutes. That took time; given the many tons of asbestos on its ships, the Navy could not quickly remove it without immobilizing the entire fleet. JA 38. But the Navy eventually transitioned away from asbestos, and much of the equipment originally used with asbestos is still in use today *without* asbestos. JA 38 (addressing transition).

2. At all times relevant here, the Navy contracted with manufacturers to supply shipboard equipment. To retain control over its ships, it required contractors to make and supply their equipment in strict compliance with detailed Navy specifications. It scrutinized contractor-provided equipment, rejecting any that failed to conform to its requirements. JA 34–35, 41.

Several features of the Navy's requirements are relevant here. First, the Navy forbade contractors from supplying certain equipment with external asbestos insulation. JA 35. Instead, the Navy required contractors to deliver their equipment uninsulated, or in what is today sometimes called "bare-metal" form. Only after the Navy accepted the equipment would the Navy (or a third-party shipbuilder) install it and insulate it with asbestos. *See* JA 35.

Second, the Navy required that some equipment be used with asbestos-containing internal materials, such as gaskets. *See* JA 798. These materials sometimes wore out and had to be replaced. When that occurred, the Navy, not the original equipment manufacturers, chose to continue using asbestos-containing materials, *see* JA 31, 288, which the Navy's own sailors (or, again, a third-party shipbuilder) then installed, *see, e.g.*, JA 789–93.

Finally, the Navy retained total control over the manuals accompanying contractor-supplied equipment, including their instructions and warnings. JA 38–41, 77–84. For example, its military specifications "addressed the instructions considered essential by the Navy to warn individuals working with [shipboard] equipment and material about potential hazards." JA 39. At first, military specifications for technical manuals did not even mention warnings. JA 39. When the Navy revised its specifications in 1957 to address warnings, it intended to include "only warnings concerning how someone might be immediately physically injured by their actions or cause serious damage to equipment." JA 39. And these updated specifications expressly directed that "warnings were to be used sparingly," and "consistent with real need." JA 39.

The Navy consciously decided to address long-term health hazards such as those presented by asbestos through "personnel training" rather than through warnings. JA 40, 201–10. As a result, when several of its asbestos suppliers offered to provide warnings in the 1940s, the Navy refused. JA 76. Years later, the Navy specifically considered whether to put a hazard label on a form of asbestos insulation. The Navy decided not to do so. JA 80. There is also no evidence that "the Navy, at any time during the 1930s through the 1960s, instructed or permitted a supplier of engineering equipment ... to affix or provide any asbestos-related warning with its equipment." JA 77. Given the Navy's knowledge of the dangers asbestos posed, its familiarity with the use of asbestos-containing materials aboard its ships, and its control over product manuals, it would have

required warnings (and would not have approved manuals without them) if it thought warnings appropriate. JA 39.

The Navy's conscious decision to rely on personnel training rather than individual warnings made sense. It needed to "provide clear, concise directions" to sailors and civil contractors. JA 38–39. Ships in general, and Navy ships in particular, are dangerous places. There is no way to warn of everything without diluting the most important warnings. That is why the Navy limited the use of warnings to imminent threats to life and limb. JA 39.

3. This case began as two separate cases, one brought by the DeVrieses and one by the McAfees.

John DeVries served aboard the *USS Turner* between 1957 and 1960, where he worked as an engineer. Pet. App. 63a–64a, 68a–69a. Bath Iron Works built that ship for the Navy in 1945 with parts made by many other contractors. JA 272, 384–89. These contractors included three of the petitioners: Foster Wheeler made "economizers" for use inside some of the ship's boilers. JA 383. CBS's predecessor-in-interest (Westinghouse Electric Corporation) made generators, forced-air blowers, and turbines. Pet. App. 64a. Air & Liquid Systems' predecessor-in-interest (Buffalo Pumps) supplied some of the ship's pumps. Pet. App. 80a. John DeVries and his wife sued these companies after he developed cancer. They claimed that his exposure to the asbestos that the Navy added to these companies' equipment post-sale caused his disease.

Kenneth McAfee served on the *USS Wanamassa* and the *USS Commodore* from the late 1970s to the

early 1980s. Pet. App. 56a; JA 517, 570. The Navy commissioned the *Commodore* in 1959, and received delivery on the *Wanamassa* in 1973. JA 586. Petitioner Ingersoll manufactured the compressors used on both ships. Pet. App. 56a. McAfee, like DeVries, developed cancer, allegedly because of his exposure to asbestos that the Navy added to these compressors after buying them from Ingersoll. He and his wife sued Ingersoll (and others) for failing to warn about the dangers of this later-added asbestos.

It is undisputed that the petitioners delivered their products in strict compliance with Navy specifications, free of external asbestos insulation. Pet. App. 4a. As noted, the Navy did require that contractors supply some equipment with asbestos-containing internal parts installed already. It is undisputed, however, that any original asbestos-containing parts had worn out—and the Navy had replaced them many times—before DeVries and McAfee set foot aboard their ships. It is also undisputed that none of the petitioners made, sold, or distributed any asbestos-containing replacement parts used aboard these ships. Thus, neither DeVries nor McAfee ever came into contact with asbestos-containing material made, sold, or distributed by the petitioners. Pet. App. 61a, 69a–70a, 77a–78a, 85a–86a.

The DeVrieses and the McAfees could not sue the Navy for the injuries that they claimed to have sustained from shipboard exposure to asbestos, because it is immune from suit. *See Feres v. United States*, 340 U.S. 135 (1950). So instead they sued the petitioners and dozens of other companies who made equipment to which the Navy later added the asbes-

tos-containing materials that allegedly caused their injuries. They alleged, among other things, negligent failure to warn. According to them, the petitioners had a duty to warn about the third-party asbestos-containing insulation and replacement parts added to their products post-sale. And, according to them, each breached that duty by failing to give a warning about the dangers of asbestos.

The District Court granted summary judgment to the petitioners in both cases. It held that equipment manufacturers have "no duty" to "warn of the dangers associated with another manufacturer's 'product' (or component part)." Pet. App. 29a–30a. Since none of the petitioners made, sold, or distributed the asbestos-containing products that injured DeVries or McAfee, none were liable for the injuries that asbestos caused. Pet. App. 18a–19a, 35a–37a.

4. On appeal, the Third Circuit consolidated the *DeVries* and *McAfee* cases and then reversed. It characterized the issue as whether a manufacturer can be held liable "for an asbestos-related injury most directly caused by parts added on to the manufacturer's product." Pet. App. 5a. After puzzling for a few pages over the "vexing question" whether to address the issue as a matter of "duty" or "proximate cause," Pet. App. 6a–9a, the court determined that it did not matter: Either way, it said, the question is whether the injuries were reasonably foreseeable, since "foreseeability is a concept embedded" in both elements. Pet. App. 7a–9a.

Because of this, the court viewed the case "as a debate over what a bare-metal manufacturer could reasonably foresee—no asbestos-related injuries, or some?" Pet. App. 10a (internal citation omitted). So

framed, the court rejected the "bright-line rule" that *no* bare-metal manufacturer could foresee asbestos-related injuries because the alternative approach—one in which some asbestos-caused injuries are "reasonably foreseeable" to those who do not supply asbestos—would be more consistent with the principles of maritime law. Pet. App. 5a, 13a. The court believed that a reasonable foreseeability test would promote maritime law's concern for the "protection of sailors," since that test would "permit a greater number of deserving sailors to receive compensation, and compensation closer to what they deserve." Pet. App. 13a, 15a.

The Third Circuit acknowledged that what is reasonably foreseeable would "necessarily be fact-specific." Pet. App. 15a. Yet it tried to list a few situations in which liability is likely. For instance, a manufacturer "may be subject to liability if it reasonably could have known, at the time it placed its product into the stream of commerce, that":

(1) asbestos is hazardous, and

(2) its product will be used with an asbestos containing part, because

   (a) the product was originally equipped with an asbestos containing part that could reasonably be expected to be replaced over the product's lifetime,

   (b) the manufacturer specifically directed that the product be used with an asbestos-containing part, or

   (c) the product required an asbestos-containing part to function properly.

Pet. App. 15a–16a.

The court stressed that these "may or may not be the only facts on which liability can arise"; the "finer contours of" its test would have to "be decided on a case-by-case basis." Pet. App. 16a.

5. Four of the defendants in the *DeVries* and *McAfee* matters—Air & Liquid Systems, CBS, Foster Wheeler, and Ingersoll—petitioned for review of the Third Circuit's ruling. This Court granted certiorari on May 14, 2018.

SUMMARY OF ARGUMENT

The plaintiffs allege that John DeVries and Kenneth McAfee were injured from exposure to asbestos. They concede that the petitioners did not make, sell, or distribute the asbestos that allegedly injured these sailors. Instead, they allege that the petitioners made equipment to which, years after the equipment's manufacture and sale, the Navy or some other third party added asbestos-containing materials made by others. And, they say, the petitioners negligently failed to warn DeVries and McAfee about the dangers of those later-added materials.

The Third Circuit held that the petitioners did indeed have a duty to warn about the risks of later-added asbestos-containing products if their use was "reasonably foreseeable." This case asks whether that is right: Can equipment manufacturers be held liable for failing to warn about the risks of third-party products added to their equipment post-sale?

I.A. Because the case arises under general maritime law—that "amalgam of traditional common-law rules, modifications of those rules, and newly created rules" that apply in admiralty, *East River Steamship*

Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 865 (1986)—the answer derives from common-law rules and the principles of maritime law. These rules and principles all require reversing the Third Circuit, and holding that those outside a product's chain of distribution are not liable for the injuries it causes.

Start with traditional tort doctrine, under which product manufacturers are not liable for injuries caused by products made, sold, and distributed by others. This traditional rule applies even when the combined use of a third-party product with the manufacturer's own is foreseeable. For example, a tire manufacturer has no duty to warn about the dangers of the wheels for which the tire is specifically designed, *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 471–72 (11th Cir. 1993), and the maker of a component part commissioned for use in a log splitter need not investigate whether the component is safe for its intended use, *Childress v Gresen Mfg. Co.*, 888 F.2d 45, 48–49 (6th Cir. 1989).

The rule limiting liability to those within a product's chain of distribution derives from two foundational tort-law principles. First, defendants have no duty to protect the public from third parties, even when the danger created by third parties is foreseeable. *See* Restatement (Second) of Torts §§ 314–15. Second, a defendant is not liable simply because its conduct forms one link in the causal chain leading to injury. There must be something directly connecting the defendant's wrongdoing to the plaintiff's injury. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). That direct connection is missing when third

parties make, supply, and sell the injury-causing product.

Applying these rules to the asbestos context means that equipment manufacturers are not liable for injuries caused by asbestos added to their products post-sale. When asbestos is added to equipment post-sale, either as insulation or in the form of a replacement part, the equipment manufacturer's only connection to the asbestos is the foreseeability of its use. As just addressed, that is not enough to justify tort liability.

In addition to contradicting settled tort-law principles, a foreseeability-based test for liability would prove unworkable. "On a ship most things are connected to other things," and thus foreseeably used with those other things. *Stark v. Armstrong World Indus., Inc.*, 21 F. App'x 371, 381 (6th Cir. 2001). So if manufacturers of naval equipment had to warn about the risks of all products that might foreseeably be used with their own, they would have to warn about innumerable other products, and sailors would be inundated with warnings. This would lead to overwarning, causing sailors to ignore those warnings that are most important. And the risk of such open-ended liability would increase equipment prices without an offsetting gain to product safety. After all, equipment manufacturers have no control over the third-party products that are added to their equipment post-sale, or the conditions in which they are used. Moreover, they cannot prevent their customers from purchasing asbestos, or search for non-asbestos alternatives, dictate safety precautions, or oversee the inclusion of warnings. Nor can they ensure that decisions to use such materials—and the

work practices involved—conform to evolving knowledge. Subjecting these manufacturers to liability would cause them to increase their prices (to hedge against the risk of liability), while diluting the incentive of those best positioned to reduce risk—the makers and sellers of the injurious products themselves—to do so. That is neither fair nor efficient.

B. The foregoing reflects the traditional common-law rule: Those outside a product's chain of distribution cannot be held liable for the injuries that product causes. This leaves only the question whether the principles of maritime law dictate modifying the common-law rule. *See East River*, 476 U.S. at 864–65. They do not. The law limiting liability to those inside a product's chain of distribution fully accords with maritime law's "traditions of simplicity and practicality." *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 631 (1959). The easily applied rule yields predictable results, which will lead to uniformity of the sort that admiralty jurisdiction exists to assure. *See DeLovio v. Boit*, 7 F. Cas. 418, 443 (C.C.D. Mass. 1815) (Story, J.). And predictability will also allow producers of maritime equipment to "look ahead with some ability to know what the stakes are in choosing one course of action or another," *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 502 (2008), thereby promoting maritime law's "fundamental interest" in the "protection of maritime commerce." *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 25 (2004) (emphasis omitted).

II. The Third Circuit's test, under which manufacturers must provide warnings about later-added components whenever the risk of injury is deemed "reasonably foreseeable" under the circumstances,

accomplishes none of this. A test that requires answering an abstract question (is the risk of injury "reasonably foreseeable"?) through the totality of the circumstances will provide few clear answers. This lack of clarity, and the difficulty of application, will undermine maritime law's "traditions of simplicity and practicality." *Kermarec*, 358 U.S. at 631. And its unpredictable application would contradict maritime law's interests in uniformity and the promotion of maritime commerce.

The Third Circuit purported to justify its approach as promoting the welfare of seamen by "permit[ting] a greater number of deserving sailors to receive compensation, and compensation that is closer to what they deserve." Pet. App. 13a. But the relevant question is not *whether* injured sailors can recover, but *from whom* they can recover. To say that they should recover does not mean they should collect from parties (like the petitioners) that did not breach a duty or cause their injuries. What is more, they can in fact recover from other sources, including dozens of "asbestos trusts" that have paid out billions of dollars to date, RAND Corporation, Asbestos Bankruptcy Trusts 28 (2010), available at https://perma.cc/5HY2-H6DH, and that are required by federal law to continue doing so, 11 U.S.C. § 524(g)(2). In any event, the Third Circuit's exclusive reliance on the welfare of seamen is misguided, since this Court has held that maritime courts should not "expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990). On top of that, a concern for the welfare of seamen does not support the Third Circuit's approach, which will spur

companies to give more warnings than are necessary, thus diluting the effect of important ones and thereby *impairing* the safety of sailors.

III. In sum, traditional tort-law doctrine and the principles of maritime law support the rule limiting liability to those in a product's chain of distribution. Because the petitioners did not make, sell, or distribute the asbestos-containing products that allegedly injured DeVries and McAfee, they are entitled to judgment as a matter of law. Indeed, the facts here vividly show that liability should be limited to those inside the chain of distribution. That is because the connection between the petitioners and the plaintiffs' alleged injuries is significantly attenuated: The plaintiffs allege injuries from exposure to asbestos-containing insulation and replacement parts added to the petitioners' equipment years (or even decades) after its sale. Those injuries were possible only because of a series of independent decisions—for example, *the Navy's* decision to *require* the use of asbestos for decades after learning of its dangers, and the decisions of innumerable third parties who chose to make, sell, and distribute the later-added asbestos. In light of the many independent decisions standing between the petitioners' actions and the injuries alleged, the petitioners did not cause those injuries in any meaningful sense.

This Court should reverse the Third Circuit's judgment, and remand with instructions to affirm the District Court's entries of summary judgment in favor of the petitioners.

ARGUMENT

May manufacturers of naval equipment be held liable under maritime law for injuries caused by asbestos that they did not make, sell, or distribute, and that Navy sailors and third-party shipbuilders added to their equipment post-sale? Because no statute resolves this question, the answer turns on the general maritime law—the "amalgam of traditional common-law rules, modifications of those rules, and newly created rules" that apply in admiralty. *East River*, 476 U.S. at 865. When determining the general maritime law, admiralty courts look to "state and federal sources," including the common law. *Id.* at 864; *accord The Lottawanna*, 88 U.S. 558, 576 (1874). They then decide, considering maritime law's own "principles," whether to incorporate the law from these other sources into maritime law. *East River*, 476 U.S. at 865.

Here, the common law and the principles of maritime law point in the same direction: Manufacturers are not liable for injuries caused by products that they did not make, sell, or distribute, even if those products might foreseeably be used with their own.

I. MANUFACTURERS ARE NOT LIABLE FOR INJURIES ALLEGEDLY CAUSED BY THIRD-PARTY ASBESTOS ADDED TO THEIR EQUIPMENT POST-SALE.

In general, there is no duty to protect the public from third parties. In the products-liability context, this means that manufacturers are not liable for injuries caused by third parties' products. The reasons for this rule are just as applicable at sea as they are

on land. The Court should recognize it as binding in cases governed by maritime law.

A. Well-settled tort-law principles forbid such liability.

The principle that a person is not liable for injuries caused by someone else's products follows from products-liability cases, from tort-law doctrine generally, and from the purposes of tort law.

1. ***Products-Liability Cases.*** Courts have long held that companies can be held liable for the injuries that their products cause. In the Restatement's terms: "One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect." Restatement (Third) of Torts: Prod. Liab. § 1 (1998).

Conversely, courts have traditionally held that companies are not liable for injuries caused by *others'* products. Car manufacturers need not warn about the dangers of aftermarket parts compatible with their vehicles. *See Baughman v. Gen. Motors Corp.*, 780 F.2d 1131, 1132 (4th Cir. 1986). Tire manufacturers have no duty to warn about the dangers of the wheels with which they are compatible—even when they are designed specifically to be used with those wheels. *See Reynolds*, 989 F.2d at 471; *accord Acoba v. Gen. Tire*, 986 P.2d 288, 305 (Haw. 1999). The maker of dialysis machines has no duty to warn about the risks of the third-party formaldehyde used—at the maker's recommendation—to clean its machines. *Brown v. Drake-Willock Int'l, Ltd.*, 530 N.W.2d 510, 514–15 (Mich. Ct. App. 1995); *accord Dreyer v. Exel Indus., S.A.*, 326 F. App'x 353, 357–58

(6th Cir. 2009). And the manufacturer of a custom-ordered component piece has no duty to investigate whether its piece is safe for use in the customer's log splitter. *See Childress*, 888 F.2d at 49.

All of this fully accords with consumer expectations. The home chef who buys a butcher's knife would hardly expect a warning about the dangers of other products—undercooked meat, for example—with which the knife will foreseeably be used. Similarly, a hockey player would be surprised to learn that he could sue the maker of his skates for failing to warn about the risk of head injury associated with an improperly secured helmet. A swimmer injured while diving into a shallow pool would not think to sue the maker of her swimsuit for failing to warn about the risks of diving without first checking the depth. It would be absurd if a smoker could sue the manufacturer of his cigar lighter or ash tray for failing to warn about the dangers of smoking. And it would be equally absurd if a boater could sue the seller of marine gasoline for failing to warn about the risks of boating at high speeds.

Perhaps because a rule subjecting companies to liability for the dangers of third-party products would lead to these untenable results, few plaintiffs outside the asbestos context have even argued for such a rule. And, outside the asbestos context, those who have made these arguments have failed. *See, e.g.*, *Brown*, 530 N.W.2d at 515; *Reynolds*, 989 F.2d at 471; *Baughman*, 780 F.2d at 1132–33.

2. *Tort Doctrine.* The rule limiting liability to those within a product's chain of distribution derives from foundational tort-law principles.

To start, one of the most "deeply rooted" principles of Anglo-American tort law is the "difference ... between misfeasance and nonfeasance." Prosser & Keeton on the Law of Torts § 56 (5th ed. 1984). A defendant is liable only for his own "active misconduct working positive injury," not for his passive "failure to take steps to protect" victims from harms caused by third parties. *Id.* This traditional principle is sometimes expressed as a "duty": A defendant owes no duty to protect the public from dangers that third parties create. Restatement (Second) of Torts § 315 (1965). It can also be expressed as proximate causation: To recover in negligence, the plaintiff must show that "*[t]he actor's* negligent conduct" caused the harm. *Id.* § 431 (emphasis added). Either way, the underlying principle is that a defendant is liable for the consequences of his own wrongdoing, not for failing to ameliorate the wrongdoing of others. And that is true *without regard* to how foreseeable the third party's wrongdoing is; in general, no one has a duty to stop, and no one can be held liable for, even foreseeable third-party misconduct. *See id.* § 314; *accord, e.g.*, *Iseberg v. Gross*, 879 N.E.2d 278, 284 (Ill. 2007).

The second principle is related to the first: A defendant cannot be held liable simply because its conduct forms one link in the causal chain leading to injury. Instead, there must be something more directly connecting the defendant's wrongdoing to the plaintiff's injury. Without this requirement, *any* affirmative act serving as a but-for cause of a later injury would subject the actor to liability. That would amount to imposing a duty to rescue, since it would obligate would-be defendants to intervene to protect

would-be plaintiffs from injuries caused by downstream actors. This principle is perhaps most naturally expressed in terms of proximate cause, which requires "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268. But it can also be thought of as duty, as it is when courts proclaim that there is no duty to protect against remote harms. *See, e.g.*, *Bryant v. Glastetter*, 38 Cal. Rptr. 2d 291, 296–97 (Cal. Ct. App. 1995). Either way, the underlying principle recognizes that the plaintiff must prove something more than a but-for connection.

Applied to the products-liability context, these principles mean that a defendant is responsible only for the injuries directly caused by its own products, not for the failure to protect consumers against injuries caused by third-party products foreseeably used with its own. Again, one can think of this principle under the rubric of either duty or proximate causation. The manufacturer of product A has no duty to warn consumers against the hazards of product B. And a plaintiff cannot recover against the manufacturer of one product for harms caused by a different product.

The cases discussed at the outset reflect this principle. *See, e.g.*, *Brown*, 530 N.W.2d at 515; *Baughman*, 780 F.2d at 1133; *Reynolds*, 989 F.2d at 471; *Childress*, 888 F.2d at 49. Many others confirm it. *See, e.g.*, *Dreyer*, 326 F. App'x at 357–58 (6th Cir. 2009) (manufacturer of paint sprayer had no duty to warn about dangers of product foreseeably used to clean it); *O'Neil v. Crane Co.*, 266 P.3d 987, 991 (Cal. 2012) (no liability for third-party asbestos-containing replacement parts); *In re Deep Vein Thrombosis*, 356

F. Supp. 2d 1055, 1067–68 (N.D. Cal. 2005) (no duty to warn about risks presented by seats foreseeably installed on Boeing's planes); *Toth v. Econ. Forms Corp.*, 571 A.2d 420, 423 (Pa. Super. Ct. 1990) (scaffolding company not responsible for warning about risk of injury arising from scaffolding's use with defective boards); *Newman v. Gen. Motors Corp.*, 524 So. 2d 207, 209 (La. Ct. App. 1988) (GMC not liable for defective ratchet added to vehicle by a third party post-sale); *Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 68 (Tex. 1989) (no liability without proof of which defendant made injury-causing asbestos).

The rule limiting liability to those inside a product's chain of distribution is a "fundamental principle" of products-liability law. *Gaulding*, 772 S.W.2d at 68. It applies without regard to whether the plaintiff seeks relief in strict liability or negligence. *See O'Neil*, 266 P.3d at 991; *Childress*, 888 F.2d at 48; *Lindstrom v. A-C Prod. Liab. Tr.*, 424 F.3d 488, 492 (6th Cir. 2005). Similarly, it applies to all theories of products liability. Thus, manufacturers are not liable for the design or manufacturing defects of third-party components (like wheels) added to their products (like cars) post-sale. *See Baughman*, 780 F.2d at 1132. And a "manufacturer generally does not have a duty to warn or instruct about another manufacturer's products," even where "a third party might use those products in connection with the manufacturer's own product." *Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 614 (Tex. 1996); *accord Mitchell v. Sky Climber, Inc.*, 487 N.E.2d 1374, 1376 (Mass. 1986).

All this is true even for defendants who reasonably could have foreseen that their products would be

used with the injury-causing product. That is clear from the cases so holding. *See, e.g.*, *Dreyer*, 326 F. App'x at 357–58; *Brown*, 530 N.W.2d at 514; *Reynolds*, 989 F.2d at 472; *Childress*, 888 F.2d at 47–48. It is equally clear from the dearth of cases holding otherwise. For as long as people have been starting fires by striking flint against steel, they have been using products together with other products. In all that time, there have been innumerable situations where the maker of a non-defective product was more solvent—or for some other reason a more attractive defendant—than the maker of the injury-causing defective product. In all those cases over all those years, plaintiffs' lawyers have had strong incentive to sue the maker of the non-defective product. Why, then, after all these centuries, are there not more suits against those who made non-defective products for injuries caused by defective products foreseeably used along with their own? Why, for that matter, did asbestos plaintiffs sue bare-metal manufacturers like the petitioners only after running out of other defendants to sue? *See* Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The "Endless Search for a Solvent Bystander,"* 23 Widener L.J. 59, 61 (2013) (explaining the history of asbestos litigation).

The most logical explanation is that tort law has never permitted such suits. Indeed, the sparse cases imposing liability on one manufacturer for injuries caused by another's product are aberrant and widely regarded as contradicting foundational tort-law principles. Take the outlier cases holding brand-name drug manufacturers liable for injuries caused by their generic counterparts. *See, e.g.*, *T.H. v. Novartis*

Pharms. Corp., 407 P.3d 18, 29 (Cal. 2017). *But see Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1285 (10th Cir. 2013); *In re Darvocet, Darvon, & Propoxyphene Prods. Liab. Litig.*, 756 F.3d 917, 938–39 (6th Cir. 2014). Not one member of this Court imagined that possibility when the Court held that failure-to-warn claims against generic manufacturers are preempted—indeed, quite the opposite. *See PLIVA, Inc.* v. *Mensing*, 564 U.S. 604, 625 (2011) ("acknowledg[ing] the unfortunate hand that federal drug regulation has dealt" those who are injured by generic drugs); *id.* at 643 (Sotomayor, J., dissenting) ("[A] drug consumer's right to compensation for inadequate warnings now turns on the happenstance of whether her pharmacist filled her prescription with a brand-name drug or a generic."). That centuries of tort law have not produced any widely accepted body of case law allowing liability for third-party products is a good sign that centuries-old principles do not allow it.

3. *Purposes of Tort Law.* All of this fully accords with tort law's purposes: Vindicating plaintiffs who are wronged, and efficiently allocating responsibility to the party best-positioned to stop the harm.

From one perspective, the main function of tort law is to give remedies to people injured by wrongful conduct. Tort law does this by imposing liability on those parties who can fairly be blamed for the plaintiff's injury. Attenuated connections do not count. That is why a railroad that negligently fails to drop a passenger off at her stop, and then buys her a hotel room for the night, is not liable when an exploding lamp injures her while she sleeps. *Cent. of Ga. Ry. Co. v. Price*, 32 S.E. 77, 77–78 (Ga. 1898). It is also why a campground cannot be held liable for failing to

warn patrons about the dangers on an adjoining property. *Fabend v. Rosewood Hotels & Resorts, L.L.C.*, 381 F.3d 152, 155 (3d Cir. 2004). Both the railroad and the campground played a causal role in the plaintiff's injuries. In neither case, however, is the plaintiff seeking relief for an injury fairly attributable to the *defendant's* wrongdoing.

The same logic supports the rule limiting liability to those inside a product's chain of distribution. These companies have control over their products; they can test them, address any safety concerns, and even stop the products from going to market. In contrast, those outside the chain of distribution cannot control third-party products used with their own. Holding them liable for injuries caused by these third-party products would impose liability for harms inflicted by someone else's wrongdoing. That is exactly the sort of attenuated liability that tort law concepts like duty and proximate cause prohibit. *See Cent. of Ga. Ry.*, 32 S.E. at 77–78; *Fabend*, 381 F.3d at 155.

Tort law's concern with efficiency also supports the traditional rule imposing liability only on those within a defective product's chain of distribution. From this perspective, liability belongs with the party "who is best positioned to avoid the loss." *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Riggs Nat'l Bank of Washington, D.C.*, 5 F.3d 554, 557 (D.C. Cir. 1993) (Silberman J., concurring). "Placing liability with the least-cost avoider increases the incentive for that party to adopt preventive measures and ensures that such measures would have the greatest marginal effect on preventing the loss." *Id.* And in the products-liability context, even where the least-cost avoider

cannot *prevent* the injury, the prospect of liability will lead to increased prices, and "the increased prices will ... discourage consumers from purchasing risky products and thereby lower total accident costs to society." *Bynum v. FMC Corp.*, 770 F.2d 556, 571 (5th Cir. 1985); *see also* Richard A. Posner, Economic Analysis of Law 183 (6th ed. 2003).

This Court has recognized that products-liability law is built upon the least-cost avoider rationale; it fixes "responsibility" for injuries caused by defective products "wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market." *East River*, 476 U.S. at 866 (internal quotation marks omitted). That rationale justifies limiting liability to those within the chain of distribution. For one thing, those inside the chain of distribution are the only parties positioned to do anything about a potential defect; they can test their products and fix them before they hit the market. For another, imposing liability on those *outside* the chain of distribution would blunt the incentive to perform that testing. After all, if liability were imposed on those outside the chain of distribution, each party within the chain of distribution would face a lower risk of liability, and thus have less incentive to improve product safety.

What is more, imposing liability on those outside the chain of distribution would result in increased costs not justified by an offsetting gain to safety. Any company that may be held liable for selling a product must increase its prices to account for that risk. The added costs might be justified if they encourage consumers to buy, and manufacturers to develop, safer products. But imposing liability on those outside the

chain is unlikely to encourage the production of safer products. That is because those outside the chain of distribution are rarely capable of doing anything to make *third-party* products safer. As the California Supreme Court explained, there "is no reason to think a product manufacturer will be able to exert any control over the safety of replacement parts or companion products made by other companies." *O'Neil*, 266 P.3d at 1007. Given this lack of control, imposing liability on the manufacturers and suppliers of safe products—forcing them to raise their prices or exit the market—would do little except discourage socially and mutually beneficial sales. That is the definition of inefficiency.

In fact, imposing liability on those outside the chain of distribution would *undermine* safety in the failure-to-warn context, because it would lead to overwarning. *See id.* Those who read warnings have only so much time in the day, and they will ignore warnings altogether—including the ones they need—if they are inundated with useless ones. *See, e.g.*, FDA, 73 Fed. Reg. 49603, 49605–06 (Aug. 22, 2008) (overwarning may dilute other "more important warnings" and "deter appropriate use" of beneficial products); James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 296–97 (1990).

Any modern consumer knows the feeling. A restaurant patron in California, for example, likely receives warnings "about olives, bread, and chicken because those foods" naturally "contain trace amounts of substances known to cause cancer in rodents" at much higher doses. Michael L. Marlow, *Too Much*

(Questionable) Information?, Regulation 20, 22 (Winter 2013–14). If she bothers to read this information, it may deter her from engaging in perfectly healthy behavior. More likely, however, she will just start to ignore warnings altogether—including those that she really needs.

To avoid this, courts should not take the view that a party's "willingness to strengthen its warning is something always to be encouraged." *Cerveny v. Aventis, Inc.*, 855 F.3d 1091, 1102 (10th Cir. 2017). A good place to start is with refusing to impose on manufacturers "a duty to warn or instruct about another manufacturer's products." *Firestone*, 927 S.W.2d at 614. That at least removes the incentive to issue warnings about products made, sold, and distributed by others.

4. *Asbestos.* Under the doctrine set out above, equipment manufacturers are not liable for injuries caused by asbestos added to their equipment post-sale. When a third party makes an asbestos-containing component, it puts a product of its own into the stream of commerce. *See Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875, 884–85 (1997) (in maritime law, components added to a product after its sale are "not part of the product" to which they are added). Those *outside* the chain of distribution thus owe no duty as to, and are not the proximate causes of, injuries that the asbestos causes. *See, e.g.*, *Lindstrom*, 424 F.3d at 492–95; *Grant v. Foster Wheeler, LLC*, 140 A.3d 1242, 1248–49 (Me. 2016); *O'Neil*, 266 P.3d at 996; *Braaten v. Saberhagen Holdings*, 198 P.3d 493, 502 (Wash. 2008).

To see why this is true, first consider manufacturers who made, sold, and distributed equipment with

no asbestos at all. This equipment of course presents no asbestos-related danger unless some third party introduces a danger through the manufacture, distribution, and installation of its own, separate product containing asbestos. To hold the original equipment manufacturer liable for this later-introduced risk would contravene the rule that there is no duty to protect the public from third-party actions. Restatement (Second) of Torts § 315 (1965). It would be equally inconsistent with the concept of proximate causation, which requires "some direct relation between the injury asserted"—here, an asbestos-caused disease—"and the injurious conduct alleged." *Holmes*, 503 U.S. at 268. The connection between the equipment manufacturer and the asbestos-caused injury is quite *indirect*, since it depends on a third party introducing the risk by producing and installing asbestos.

True, the bare-metal manufacturer might foresee that asbestos-containing materials will be used with its product. But that is not enough to justify liability. If it were, the maker of dialysis machines would have to issue warnings about the dangers of the chemicals it recommends for cleaning its machines, *Brown*, 530 N.W.2d at 514, the tire manufacturer could be liable for injuries caused by the wheel for which it was specifically designed, *Reynolds*, 989 F.2d at 471, the cutler could be sued for the dangers of undercooked meat, and so on. In each of these cases, the harm posed by some third-party product is wholly foreseeable. And in each, the manufacturer of the safe product is not liable for the injuries that a third-party product caused, because it neither owed a duty nor proximately caused the injury.

The same logic applies to manufacturers whose equipment originally came with asbestos-containing parts that were replaced before the user used that equipment. These manufacturers stood in the same relation to any later-added asbestos as did the makers of asbestos-free equipment: Both could have *foreseen* the future use of asbestos, but neither had any *control* over third parties' decisions whether to use asbestos-containing parts in the future. Any injuries arising from later-added asbestos, including later-added replacement parts, resulted directly from third-party conduct. Thus, just like the makers of equipment originally supplied without any asbestos, makers of equipment with asbestos-containing parts had no duties relating to, and did not proximately cause any injuries arising from, asbestos added to their equipment post-sale. *See, e.g.*, *Lindstrom*, 424 F.3d at 492–95; *Grant*, 140 A.3d at 1248–49; *O'Neil*, 266 P.3d at 996.

All of this accords with tort law's interest in giving plaintiffs a remedy against those who wrong them. As suggested above, once these manufacturers put their equipment into the stream of commerce, they could not "exert any control over the safety of replacement parts or companion products made by other companies." *O'Neil*, 266 P.3d at 1007. Nor could they exert any control over whether some intermediary, like the Navy, continued to require asbestos. And these independent decisions to supply asbestos and require it were often made over the course of many years, even decades (as in *DeVries*). There is no relevant sense in which an injury that results from a series of independent decisions by the Navy and third parties is fairly attributable to the manu-

facturer who supplied the equipment. At most, the equipment manufacturer created "a mere condition" that allowed some other party to take independent actions that injured the plaintiff. The creation of such a condition has never been enough to constitute a "proximate cause." *Gilman v. Cent. Vermont Ry. Co.*, 107 A. 122, 125 (Vt. 1919). What is more, imposing liability would amount to a duty to protect against third-party actions. These longstanding tort-law rules show that manufacturers of equipment to which injury-causing asbestos is later added do not commit the sort of "wrong" for which tort law imposes liability.

That conclusion is even stronger when the plaintiff was exposed to asbestos while working on complex systems, such as propulsion systems in ships, *see, e.g.*, *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791, 800 (E.D. Pa. 2012), or steam-pipe systems in buildings, *see In re New York City Asbestos Litig.* (*"Dummitt"*), 59 N.E.3d 458, 467 (N.Y. 2016). These systems generally consist of many individual component products; for example, the turbines in a propulsion system, or the piping in a heating system. If it was important to use asbestos, it was important to the system as a whole. Imposing liability on whoever made the part of a system to which the injury-causing asbestos happened to be attached would make "the scope of a manufacturer's liability turn on what seems" to be a "fortuity." *Saratoga*, 520 U.S. at 881.

Many of the same considerations bear on tort law's concern with regulating the conduct of product manufacturers. The "curbstone philosopher['s]" observation that "everything is related to everything else,"

Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A. Inc., 519 U.S. 316, 335 (1997) (Scalia, J., concurring), is particularly true at sea: "On a ship most things are connected to other things," *Stark*, 21 F. App'x at 381, so most ship components will be used with other components. As a result, imposing liability on *everyone* who made a product foreseeably used with asbestos would risk imposing liability on *everyone* who made or sold a product incorporated into a ship's (or a building's, or a car's) asbestos-containing systems. That would no doubt increase the price of each component, but it would do nothing at all to improve safety. Worse, it would dilute the incentive to make a safer product by spreading the risk of liability to those (often solvent defendants) outside the asbestos-containing product's chain of distribution.

The interconnectivity also raises concerns about overwarning. Requiring each manufacturer whose equipment was foreseeably used with asbestos to warn about the risks of asbestos would have inundated those tasked with maintaining that equipment with warnings. And that would have presented dangers all its own, because ships—especially warships—pose many *immediate* risks to life and limb that a sailor could miss if warned of every potential risk. In this context, the more sensible approach was the one the Navy adopted: Give warnings only of the most immediate threats, dealing with long-term hazards, such as those posed by asbestos, through training and other means. JA 39–40.

What all of this shows is that traditional tort principles support the so-called "bare-metal rule," under which equipment manufacturers are not liable for

injuries caused by asbestos insulation and asbestos-containing components obtained by the user from other sources and added to the equipment by a third party post-sale.

B. The principles of maritime law require the same rule.

The next question is whether this tort-law doctrine comports with the principles of maritime law. It does.

1. ***Principles of maritime law.*** The Constitution gives federal courts jurisdiction over suits arising in admiralty, thereby securing "a uniformity of rules and decisions in all maritime questions." *DeLovio*, 7 F. Cas. at 443. This uniformity protects parties from being held to different standards in different parts of the country, allowing them to "look ahead with some ability to know what the stakes are in choosing one course of action or another." *Exxon Shipping*, 554 U.S. at 502. This predictability promotes maritime law's most "fundamental interest": "the protection of maritime commerce." *Norfolk S.*, 543 U.S. at 25 (internal quotation marks and emphasis omitted). And the benefits of predictability have fostered a longstanding tradition of "simplicity and practicality" in maritime law. *Kermarec*, 358 U.S. at 631.

Maritime law also has a long tradition of "special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 387 (1970). The principle arose in an era when courts viewed sailors as "ignorant and helpless, and so in need of protection against [themselves] as well as others." *Warner v. Goltra*, 293 U.S.

155, 162 (1934). While at sea, these men were at the mercy of the ship and the captain. Given this disparity in power, maritime-law doctrines sometimes make it easier for seamen to recover against their disproportionately powerful employers. *See Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 246 (1942). This Court has never, however, used maritime law's concern with the welfare of seamen to adopt whatever rule maximizes their potential for recovery. To the contrary, it expressly stated that courts should *not* "expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them." *Miles*, 498 U.S. at 36.

The Court has often turned to the foregoing principles in determining the general maritime law. *East River*, 476 U.S. 858, is illustrative. There, the Court held that maritime law recognizes the "economic loss rule," under which "a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself." *Id.* at 871. It relied in large part on its view that *rejecting* the economic-loss rule would impair maritime commerce by collapsing the distinction between contract law and tort law, and by subjecting maritime-equipment manufacturers to large, unpredictable awards. *Id.* at 871–75. "In products-liability law, where there is a duty to the public generally, foreseeability is an inadequate brake" on liability, and "[p]ermitting recovery for all foreseeable claims for purely economic loss would make a manufacturer liable for vast sums." *Id.* at 874. So while state courts had disagreed about whether to adopt the economic-loss rule, this Court determined that the rule ought to apply as a matter

of maritime law, since it fit with that body of law as a whole.

Similarly instructive is the Court's decision in *Kermarec v. Compagnie Generale*, which held that maritime law does not incorporate the common law's distinction between invitees and licensees as it relates to premises liability. 358 U.S. at 630–31. The complexity of that distinction had caused courts "to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each," "produc[ing] confusion and conflict" even in the common law. *Id.* at 630, 631. "[T]o import such conceptual distinctions"—even long-recognized ones—"would be foreign to" maritime law's "traditions of simplicity and practicality." *Id.* at 631.

2. ***Applicability of the traditional rule.*** The rule limiting liability to those within the chain of distribution fully accords with maritime law. For one thing, it is predictable and easily applied. Courts must only identify the injury-causing product and ask whether the defendant made, sold, or distributed it. If the answer is yes, the defendant might be liable. If the answer is no, the defendant is not liable. This test avoids all the complications that would arise from asking whether the interaction between products is foreseeable, a complication that is especially serious on ships, where most things are connected.

For another thing, the rule yields predictable, uniform results across the country, allowing those engaged in maritime commerce and navigation to "look ahead with some ability to know what the stakes are

in choosing one course of action or another," without having to worry about being subject to different rules in different parts of the country. *Exxon Shipping*, 554 U.S. at 502. That promotes maritime law's "fundamental interest"—fostering maritime commerce. *Norfolk S.*, 543 U.S. at 25.

Finally, there is maritime law's interest in the welfare of seamen. The traditional rule limiting liability to those in the chain of distribution leaves sailors no worse off than any other tort litigant. For instance, they can still sue manufacturers of asbestos-containing parts, just like anyone else injured by a defective product. They also have access to asbestos-specific procedures, such as the "asbestos trusts" established in accordance with federal bankruptcy law. These trusts, funded with the reorganizing company's assets, must "use [their] assets or income to pay claims and demands." 11 U.S.C. § 524(g)(2). In return for the establishment of this trust, the bankruptcy court may enter a channeling injunction requiring that asbestos claims be brought against the trust rather than the reorganized company. *Id.* § 524(g)(1). More than 50 asbestos trusts have been established. RAND Corporation, *Asbestos Bankruptcy Trusts* 28 (2010), available at https://perma.cc/5HY2-H6DH. Through 2008, these trusts had paid out $10.9 billion in claims to "hundreds of thousands of claimants." *Id.* at 13, 28. They will continue to do so, since federal law requires such trusts to operate in a way that "provide[s] reasonable assurance that the trust will ... be in a financial position to pay ... present claims and future demands." 11 U.S.C. § 524(g)(2).

Of course, it is easy to conceive of liability rules that might permit recovery by individual sailors where traditional tort law does not. ("The sailor always wins," for starters.) This Court, however, has long denied that courts should adopt whatever rule helps sailors the most. *Miles*, 498 U.S. at 36. And in any event, the justifications for giving seamen "special solicitude" are outdated and inapplicable to this case. Centuries ago, admiralty courts believed that seamen were "deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults" and therefore needed "the protection of the law in the same sense in which minors and wards are entitled to the protection of their parents and guardians." *Robertson v. Baldwin*, 165 U.S. 275, 287 (1897). As Justice Story put it: "They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. ... Every court should watch with jealousy an encroachment upon the rights of seamen ... because they are thoughtless and require indulgence; because they are credulous and complying; and are easily over reached." *Harden v. Gordon*, 11 F. Cas. 480, 483, 485 (C.C.D. Me. 1823)

It should go without saying that this conception of sailors, especially *Navy* sailors, is worse than outdated. The disparaging characterizations, already criticized more than 70 years ago, *see Kelcey v. Tankers Co.*, 217 F.2d 541, 548 (2d Cir. 1954) (Hand J., dissenting), are downright absurd today:

> The modern reality is that most seamen are no longer "friendless"; rather, they have gained strength through collectivity, and they are a well-organized work force with sophisticated

> leaders who constantly press for better working conditions, pay, and benefits, as well as increased job security. Thus, the need for judicial intervention to protect seamen has been substantially lessened.

Ammar v. United States, 342 F.3d 133, 146 (2d Cir. 2003).

The other justification for "special solicitude" is the notion that seamen are at the mercy of the captain and ship while at sea, and thus require special protection. *See Castillo v. Spiliada Mar. Corp.*, 937 F.2d 240, 243 (5th Cir. 1991). But this justification is pertinent only when evaluating the scope of a captain's or shipowner's duty to otherwise helpless sailors. *See, e.g., Atlantic Sounding Co. v. Townsend*, 447 U.S. 404 (2009). It has minimal relevance in the products-liability context, where the danger posed bears no relation to the ship's captain or owner. Such cases do not involve the sort of inequality in bargaining power this Court has cited as justification for the special-solicitude rule. *See Garrett*, 317 U.S. at 246.

3. *Conclusion.* The traditional common-law rule—that product manufacturers are liable only for the products they make, sell, or distribute—best implements the principles of maritime law. So too is the more specific rule that product manufacturers are not liable for asbestos added to their products post-sale. The Court should therefore recognize these rules as a matter of maritime law.

II. THE THIRD CIRCUIT'S ALTERNATIVE APPROACH CONTRADICTS THE COMMON LAW AND UNDERMINES THE PURPOSES OF MARITIME LAW.

The Third Circuit rejected the bright-line rule above in favor of the following approach crafted specifically for asbestos cases: A "manufacturer of a bare-metal product may be held liable for a plaintiff's injuries suffered from later-added asbestos-containing materials if the facts show the plaintiff's injuries were a reasonably foreseeable result of the manufacturer's failure to provide a reasonable and adequate warning." Pet. App. 15a.

The Third Circuit adopted this test for two reasons. First, it determined that a product manufacturer "may be held liable" at common law "if the plaintiff's injury was a reasonably foreseeable result of the manufacturer's conduct." Pet. App. 6a. Second, it concluded that its rule would "permit a greater number of deserving sailors to receive compensation" than would the bright-line rule. Pet. App. 13a.

Neither justification is persuasive. Foreseeability is not the test at common law, and the Third Circuit's approach cannot be justified simply because it affords some individual plaintiffs greater recoveries.

A. Tort-law principles do not support the foreseeability-based test that the Third Circuit adopted.

The Third Circuit held that manufacturers may have a duty to warn about third-party products used with their own products when the risk of harm is reasonably foreseeable. Pet. App. 5a–6a, 45a–46a. The Third Circuit derived this test based on its mis-

taken belief that foreseeability alone creates a duty. That is wrong, as even the New York and Maryland Courts of Appeals acknowledged when they adopted tests similar to the Third Circuit's as a matter of state law. Those courts adopted the foreseeability-based test based entirely on policy concerns, without regard to the doctrinal points set out above. *Infra* 42–48. As a result, the approaches used by all three courts are as inconsistent with tort law as are the tests they adopted.

1. ***The Third Circuit's flawed approach.*** The Third Circuit concluded that manufacturers are liable for all "foreseeable" results of their decision to make a particular product. Pet. App. 6a–9a. This foreseeability-focused analysis contradicts hornbook law. As state courts across the country have held, in "strict liability as in negligence, 'foreseeability alone is not sufficient to create an independent tort duty.'" *O'Neil*, 266 P.3d at 1005 (quoting *Erlich v. Menezes*, 981 P.2d 978, 891 (Cal. 1999)); *see also, e.g.*, *McKown v. Simon Prop. Grp., Inc.*, 344 P.3d 661, 666 (Wash. 2015); *In re Certified Question from Fourteenth Dist. Ct. of Appeals of Tex.*, 740 N.W.2d 206, 212 (Mich. 2007); *Murillo v. Seymour Ambulance Ass'n, Inc.*, 823 A.2d 1202, 1205 (Conn. 2003); *Lamkin v. Towner*, 563 N.E.2d 449, 454 (Ill. 1990). Lower courts sitting in admiralty have recognized the same principle. *See, e.g.*, *Reino de España v. Am. Bureau of Shipping*, 729 F. Supp. 2d 635, 645 (S.D.N.Y. 2010).

Thus, the principle that a defendant has no duty to protect the public from the misconduct of others remains valid even if an injury is foreseeable. For example, a bystander has no legal duty to rescue a pedestrian who falls off of a dock and into the ocean,

even if it is entirely foreseeable that the man will drown without assistance. In the same way, the manufacturer of a product has no legal duty to warn a consumer against the hazards of products made by others, whether or not it can foresee those hazards.

Indeed, the leading state cases holding that product manufacturers can be liable under *state law* for injuries caused by later-added asbestos—*May v. Air & Liquid Systems Corp.*, 129 A.3d 984 (Md. 2015), and *Dummitt*, 59 N.E.3d 458—acknowledge as much. While foreseeability might be relevant to whether a defendant *violated* a duty, courts "cannot recognize a duty based entirely on the foreseeability of the harm at issue." *Dummitt*, 59 N.E.3d at 470; *accord May*, 129 A.3d at 990. Thus, even the courts that agree with the Third Circuit's bottom line reject its approach.

2. *The state courts' flawed approaches.* The approaches that *May* and *Dummitt* used, however, are equally indefensible. Neither seriously grappled with the doctrinal points set out above, *supra* 19–25, and each thus settled on a foreseeability-based test at odds with these doctrinal principles, *see May*, 129 A.3d at 1001–11 (Watts, J., dissenting) (criticizing the majority for expanding liability beyond what settled doctrine or prior cases allowed). Both courts characterized tort law as an exercise in policymaking, and determined that imposing liability on bare-metal manufacturers made good policy. According to these courts, "the determination of whether a duty exists represents a policy question of whether the specific plaintiff is entitled to protection from the acts of the defendant." *May*, 129 A.3d at 994 (citation omitted). In divining sound policy:

> the court must settle upon the most reasonable allocation of risks, burdens and costs among the parties and within society, accounting for the economic impact of a duty, pertinent scientific information, the relationship between the parties, the identity of the person or entity best positioned to avoid the harm in question, the public policy served by the presence or absence of a duty and the logical basis of a duty.

Dummitt, 59 N.E.3d at 469; *accord* May, 129 A.3d at 989 (providing a similar list of "non-exclusive factors").

Whatever its merits under state law, this free-wheeling approach has no place under maritime law. "Courts cannot give or withhold at pleasure" when "exercising the limited jurisdiction of admiralty." *S. Pac. Co. v. Jensen*, 244 U.S. 205, 220–21 (1917) (Holmes, J., dissenting). Rather than conducting their own independent inquiries into sound policy, admiralty courts must develop legal rules in light of the common law and the "body of customs and ordinances of the sea." *Id.* at 220; *see, e.g.*, *East River*, 475 U.S. at 864 ("body of maritime tort principles").

In any event, the foreseeability-based, totality-of-the-circumstances rules that *Dummitt* and *May* adopted fail on their own terms. *Dummitt* held a manufacturer must "warn of the danger arising from the known and reasonably foreseeable use of its product in combination with a third-party product which, as a matter of design, mechanics or economic necessity, is necessary to enable the manufacturer's product to function as intended." 59 N.E.3d at 463. It then held that manufacturers who made products

much like the petitioners' owed a duty to warn about the dangers of later-added asbestos. *Id.* at 483.

May, for its part, concluded that manufacturers have a duty to warn about the dangers posed by later-added asbestos when:

> (1) a manufacturer's product contains asbestos components, and no safer material is available;
>
> (2) asbestos is a critical part of the pump sold by the manufacturer;
>
> (3) periodic maintenance involving handling asbestos gaskets and packing is required; and
>
> (4) the manufacturer knows or should know of the risks from exposure to asbestos.

129 A.3d at 994.

The first problem with these tests is that they contradict the courts' self-professed desire to "[c]abin the duty" to avoid "exposing manufacturers to limitless liability." *May*, 129 A.3d at 995. As *Dummitt* put it, courts "must draw a commonsense line at which duty ends," because the "duty to warn must have a logical basis and scope that limits the legal consequences of wrongs to a controllable degree." 59 N.E.3d at 473 (internal citations and quotation marks omitted).

Neither the *Dummitt* nor the *May* formulation accomplishes this. Both use impossibly vague terms to assess foreseeability. Take whether asbestos was "necessary to enable the manufacturer's product to function as intended" (*Dummitt*'s formulation) or whether it was a "critical part" of the composite product (*May*'s formulation). The Navy eventually stopped using asbestos-containing parts with its equipment, replacing them with non-asbestos substi-

tutes, JA 38, so asbestos was never "necessary" in the strict sense of that word. The courts presumably mean something like "practically necessary," but that clarifies nothing. If there is an alternative to the component that works only slightly less efficiently or costs slightly more, is the dangerous component still "necessary" to or a "critical part" of the overall product? Who knows, but if the answer to that question is yes, then courts—and manufacturers prospectively trying to comply with the law—face intolerable burdens. What if the safer alternative is only 75% as efficient as the more dangerous alternative? What if it is 85% as efficient but costs 10% more? What if it just costs 15% more? What about 25%? Moreover, in the Navy context, "necessity" is further complicated because the Navy often required asbestos-containing products in equipment. In such instances, such components were "necessary" whether or not the asbestos content was "necessary" in some technical respect.

These aren't the only imponderables that manufacturers will face. Whether something is "critical," *May*, 129 A.3d at 994, or "economically necessary," *Dummitt*, 59 N.E.3d at 463, cannot be determined in a vacuum. For example, the Navy presumably has a lower margin for performance-related deficiencies than commercial shippers, and a lower margin for such deficiencies on battleships than on patrol boats or oceanographic research vessels. On the other hand, the Navy also has deeper pockets than international shippers, who may be wealthier than small-time fishing companies. To assess whether a third party's hazardous product was "critical" or "economically necessary" to its own, then, a manufacturer

would have to account for many incommensurable factors—including the relative danger, cost, and efficiency of a host of possible third-party components, the cost constraints within an industry, and so forth. No one has provided useful guidance on how manufacturers (prospectively) or courts (retrospectively) should balance these variables.

In addition to the uncertainty, there is another problem unique to the asbestos context. As explained above, asbestos was commonly attached to complex systems—heating systems, propulsion systems, and so on. Just about every component of these systems was foreseeably used "in combination with" asbestos. *Dummitt*, 59 N.E.3d at 463. And if asbestos was necessary (or "critical" or "economically required") for *any* part of that system to "function as intended," then it was equally necessary for every other part of it as well. To impose liability only on the party that made the part of the system to which asbestos happened to have been attached hardly qualifies as "a commonsense line." *Id.* at 473

In finding a duty to warn about the risks of later-added asbestos anyway, *Dummitt* and *May* both relied heavily on their conclusion that the maker of a durable good to which asbestos is later added is well-positioned to learn of the risk and give a warning. *See Kermarec*, 358 U.S. at 630–31. But the maker, seller, and distributor of the asbestos are all better positioned to give a warning about the dangers the asbestos poses. *Those parties* can be sure that their warning reaches either the user or an intermediary with each distribution—someone will see the warning on the package. The maker of a durable good, in contrast, can do little to ensure that warnings reach

anyone beyond the product's first recipient, and is powerless to adjust its already-distributed warnings in light of newly discovered information.

Dummitt and *May* also stressed that imposing a duty would not "saddle manufacturers with an untenable financial burden." 59 N.E.3d at 473. In reaching this conclusion, *Dummitt* asserted that "[p]rior judicial recognition of a manufacturer's duty to warn" had "not imposed extreme or unreasonable financial liability on manufacturers." *Id.* at 473. That assertion is itself doubtful; there is no good evidence that modern products-liability law is cost-justified, and good reason to doubt that it is. *See* A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 Harv. L. Rev. 1437, 1469–76 (2010); *cf.* Joanna M. Shepherd, *Products Liability and Economic Activity: An Empirical Analysis of Tort Reform's Impact on Businesses, Employment, and Production*, 66 Vand. L. Rev. 257, 261 (2013) (reporting "empirical results" indicating "that several reforms that restrict the scope of products liability have a significant impact on economic activity."). In any event, prior judicial recognition of the duty to warn has not (with any frequency, at least) extended to the dangers of third-party products, and thus shines little light on the reasonableness of the burden that manufacturers will face under *May*'s and *Dummitt*'s novel regimes.

Dummitt and *May* both asserted that any potential burdens are no big deal because of insurance. 59 N.E.3d at 473; 129 A.3d at 994. Again, it is far from clear that insurance will be available in this new tort regime, given the uncertainty of the risk. If it is, it will be more expensive, and the added expense will

either force products from the market or lead to increased prices. It is hard to justify this added cost, given the dubious value of the additional warnings that the *Dummitt* and *May* rules could spur, all of which would be over and above the warnings included with component parts, and over and above those given by employers during training.

State courts are of course free, when applying state law, to choose whatever rules they wish. But as the foregoing shows, policy considerations do not support the results in *May* and *Dummitt*, so those cases are wrongly decided on their own terms. And the test they adopted under *state* law is certainly improper in the context of general maritime law, given the policies undergirding that body of law.

B. The Third Circuit's approach contradicts the principles of maritime law.

The Third Circuit reasoned that its foreseeability-based approach best fit with maritime law's interest in the welfare of seamen, because it would "permit a greater number of deserving sailors to receive compensation, and compensation that is closer to what they deserve." Pet. App. 13a. On this basis alone, it imposed its foreseeability test. Pet. App. 13a–15a.

This analysis suffers from three flaws. First, maritime courts are not supposed to "expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them." *Miles*, 498 U.S. at 36. Second, while maritime law should permit recovery for "deserving" sailors, Pet. App. 13a, the critical question is: From whom do they deserve to collect? Foundational tort-law and maritime-law

principles both point to the same answer: They deserve to collect from the parties who made, sold, and distributed the injury-causing asbestos, not from solvent bystanders that did none of these things. *Supra* 18–40. Finally, the Third Circuit's test would likely make sailors *worse off*. It implicitly rests on the flawed assumption that every warning is a good warning. As addressed at length above, that is wrong, especially on a warship. The Third Circuit's rule gives maritime companies incentive to warn about the risks of every product foreseeably used with their own. The effect will be to drown out the truly important warnings, thus impairing rather than improving the wellbeing of seamen.

In any event, the Third Circuit's test is inconsistent with maritime law. Its vague, open-ended standard, which turns on how foreseeable was the product's use with asbestos, would be unhelpful in any context. But its application is especially complicated in maritime-law cases. Once again: "On a ship most things are connected to other things." *Stark*, 21 F. App'x at 381. And for most of the 20th century, many of those things were in some way used with asbestos. As a result, *anyone* who made a product or product-component for use aboard a ship arguably could reasonably have foreseen that its end users might be injured if not warned about the risks asbestos posed.

The Third Circuit pointed to a number of scenarios in which its foreseeability standard might be satisfied. For example, it suggested that a manufacturer would be liable where it should have known that asbestos was dangerous and should have known that asbestos would be used with its equipment because

its equipment came with asbestos that would need to be replaced, because the manufacturer "specifically directed" use with an asbestos-containing part, or because it "required an asbestos-containing part to function properly." Pet. App. 15a–16a.

These "fine gradations" and "subtle" distinctions contradict maritime law's "traditions of simplicity and practicality." *Kermarec*, 358 U.S. at 630–31. Consider the category of cases in which "the product required an asbestos-containing part to function properly." Pet. App. 15a. The concept of "functioning properly" is ambiguous, and would require courts to draw hairline distinctions, often arbitrary, between manufacturers. For example, few products on board ships would be completely inoperable without asbestos, and so the question is whether they operate so inefficiently that they cease to "function properly." It is impossible simply and practically to identify the point at which a product moves from "less efficient" to "improperly functioning." *See supra* 44–45.

The same problem plagues the prong of the test suggesting liability for those who supply a product with an asbestos-containing part or who "direct" that it be used with such parts. It is true enough that these manufacturers might reasonably foresee that their products will be used with asbestos, but at some point the manufacturer's liability must end. For example, if a ship owner continued making its employees use asbestos-containing replacement parts decades after the emergence of a perfect, cheaper substitute, its independent decision to do so would constitute an intervening act that freed the manufacturer from liability. *See Nishida v. E. I. Du Pont De Nemours & Co.*, 245 F.2d 768, 774 (5th Cir.

1957) (defendant not liable when supplier of cattle feed continued using defendant's production method after learning it was unsafe). As this shows, at some point foreseeability can no longer justify liability. But the Third Circuit provides no insight into when that occurs. Does it occur once science identifies a perfect substitute? Does it matter if the substitute is more expensive? Does it matter *how much* more expensive it is? Does an almost-perfect substitute suffice? How close must it get? Did manufacturers "direct" the use of asbestos if the military *required* them to recommend its use, and to reflect such use in their parts lists? There is no simple, practical way of answering these inherently arbitrary questions.

It only gets worse. The Third Circuit stressed that these categories are non-exhaustive, and that liability will necessarily turn on the facts of each case. Pet.App. 16a. Thus, even if manufacturers and courts can divine answers to the questions prompted by the Third Circuit's purported clarifications, many others will remain, miring every solvent bystander in intractable, unpredictable litigation and leaving courts helpless to clean up the mess.

For all the same reasons, the Third Circuit's test would undermine the uniformity that maritime law is supposed to promote. Its open-ended, unpredictable test is incapable of consistent application. Indeed, courts applying the foreseeability test have reached contradictory results. *Compare Dandridge v. Crane Co.*, 2016 WL 319938, at *4 (D.S.C. Jan. 27, 2016) (duty to warn only if the defendant's conduct makes the use of asbestos "*inevitable*") *with Kochera v. Foster Wheeler, LLC*, 2015 WL 5584749, at *4 (S.D. Ill. Sept. 23, 2015) (concluding otherwise).

What is more, complex, unpredictable rules "are too indeterminate to enable manufacturers easily to structure their business behavior." *East River*, 476 U.S. at 870. In *East River*, this Court rejected a foreseeability-based approach to products-liability law in favor of a bright-line rule, precisely because the foreseeability-based standard threatened limitless liability to those engaged in maritime commerce. *Id.* at 871–75. The same concerns apply here. Foreseeability in this context threatens massive liability, especially given the durable, interconnected nature of ships. This risk will increase prices, lowering demand and hampering maritime commerce from both a consumer's and a supplier's perspective. And since the benefits of imposing liability on manufacturers are uncertain at best, "[t]he increased cost to the public that would result from holding a manufacturer liable in tort for injury to the product itself is not justified." *Id.* at 872.

III. THE PETITIONERS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

It follows that product manufacturers cannot be held liable under maritime law for injuries caused by asbestos that they did not make, sell, or distribute. That rule resolves this case. It is undisputed that none of the petitioners made, sold, or distributed the asbestos alleged to have caused John DeVries's or Kenneth McAfee's injuries. Pet. App. 4a, 61a, 69a, 78a, 86a. Each petitioner is thus entitled to judgment as a matter of law, and the Third Circuit therefore erred in reversing the District Court's awards of summary judgment.

The facts here underscore why the petitioners should not be liable for injuries caused by asbestos

that *the Navy* added to equipment originally supplied by the petitioners. Again, the common-law rule can be characterized in terms of duty or proximate causation. Either way, it reflects the notion that tort defendants are not liable for injuries too attenuated from their own conduct. Here, the Navy retained complete control over the products used aboard its ships. Thus, no party to this case disputes the Navy's active involvement in the decision whether to use asbestos; its ships used asbestos because the Navy mandated that they do so. Similarly, the Navy retained control over whether and how to warn about asbestos. And given the Navy's control over warnings, its preference for dealing with asbestos's hazards through training rather than through warnings, JA 39–40, and its consistent rejection of asbestos warnings, JA 76, 80, the only logical conclusion is that it did not think warnings were justified.

All of this shows that the attenuated nature of the causal connection between the petitioners and the alleged injuries is particularly stark. Both John DeVries and Kenneth McAfee claimed to have been injured by exposure to asbestos insulation and asbestos-containing replacement parts added to the petitioners' equipment years or even decades after its sale. Therefore, between the petitioners' actions and the injury-causing event stand countless independent decisions by other actors: the decisions by third parties to make, sell, and supply asbestos-containing insulation and replacement parts, the Navy's decisions to continue using asbestos, the Navy's decision to address the risks of asbestos through training rather than through labeling or warnings, and so on. The Navy, for its part, made these independent deci-

sions even though it appreciated the dangerous nature of asbestos no later than 1922—and even though, by the late 1930s, it knew the risks well enough to have published reports recommending that those working with asbestos take steps to avoid inhaling it. *Supra* 4–6.

The petitioners had no control over these decisions, and cannot fairly be said to have caused the injuries that allegedly resulted. To hold otherwise would be to impose on the manufactures of naval equipment a duty to protect the public from the conduct of third parties. *Contra* Restatement (Second) of Torts § 315 (1965). And it would ignore the rule that proximate cause requires a "direct relation between the injury asserted and the injurious conduct alleged," *Holmes*, 503 U.S. at 268.

The common law reflects the collective wisdom of generations of jurists. There is no plausible basis for rejecting that wisdom here.

CONCLUSION

The Court should reverse the Third Circuit, and remand with instructions to affirm the District Court's entries of summary judgment for the petitioners.

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